Supreme Court, U.S.
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No. 99-1193

In the Supreme Court

OF THE

United States

RAYMOND FRAZER,
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of the State of California

REPLY BRIEF

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Overview

Criminal statutes of limitation, in jurisdictions which have them (nearly all), are intended to "provide predictable, legislatively enacted limits on prosecutorial delay." *United States v. Lovasco*, 431 U.S. 783, 789 (1977); *see United States v. Marion*, 404 U.S. 307, 322-23 (1971) [cited in Petn. at 26]. More generally, a high value is placed on legal certainty, stability, and finality in our system of justice. *See, e.g., United States v. Timmereck*, 441 U.S. 780, 784 (1979); *Sparf v. United States*, 156 U.S. 51, 83 (1895); *Schmuck v. United States*, 489 U.S. 705, 721 (1989).

Here, the State invokes the U.S. Constitution to seek a result that undoes order and stability in legal relations and destroys finality, by allowing a government to fake out its citizens with a promise of liberty on which the government can later renege at its pleasure, years or decades after the promise becomes unconditional. Petitioner disagrees that the Framers of our Constitution would have thought this an acceptable model of legislative power. *See also infra*, p. 10.

The State has not disagreed with petitioner's point that if a government can retroactively breach an unconditional promise of finality for people charged with sex offenses, it can do so for people charged with any type of offense. *See* Petn. at 12. That ill serves the key purpose of the prohibitions against retroactive legislation, curbing legislative "tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf v. USI Film Products*, 511 U.S. 244, 266-67 & n. 20 (1994) [quoting Madison, Federalist No. 44]; *accord, e.g., Garner v. Jones*, 2000 U.S. LEXIS 2346, at 18 (U.S. Mar. 28, 2000). People charged with sex offenses may be today's unpopular group subjected to retroactive abrogation of finality in one or more states. Tomorrow's may be people alleged to have overestimated profits of a publicly traded corporation, underpaid taxes, negligently commanded a wrecked vessel, protested too vigorously for a cause of great importance to them, or the like. A constitutional protection denied one is denied all. *See, e.g.,* Thomas Paine, "Dissertation on First Principles of Government," in Common Sense and Other Political Writings 174 (Adkins, 1953).

I. *Ex Post Facto* Clause

The State severely truncates petitioner's authority for his showing that this Court has utilized differing and possibly conflicting formulations in describing the *ex post facto* prohibition. *See* Petn. at 5-8, 17-18. The State claims petitioner's authority was no more than "a pre-*Youngblood* case, *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), which was examined in detail in [*Collins v. Youngblood*, 497 U.S. 37 (1990)], and [a] one-line parenthetical summary in another case, *Hughes Aircraft Corp. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997) . . . ." Br. Opp. at 5. Apparently, the State is trying to suggest that this Court has never used differing formulations of the *ex post facto* prohibition except in *Calder*, and it took care of *Calder* in *Youngblood*.

The State's effort is patently in error. In the same paragraph in which he cited *Calder* and *Hughes Aircraft*, petitioner also cited two passages in *Youngblood*, and two passages in *Beazell v. Ohio*, 267 U.S. 169 (1925), which supported his argument and worked against the State's narrow, technical view. Petn. at 6. Later, petitioner twice quoted Justice Thomas's opinion for this Court in *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), and again quoted *Beazell*, for more formulations supporting his view that *ex post facto* analysis is not limited to immutable categories, and against the State's view that it is. Petn. at 7, 17-18.

Furthermore, while the State tries to dismiss *Hughes Aircraft* by a throwaway reference to a "one-line parenthetical," Br. Opp. at 5, the "one-line parenthetical" is this Court's description of its own *Beazell* and *Youngblood* opinions–after *Youngblood*. This Court in *Hughes Aircraft* quoted *Youngblood* for the point that "'A law that abolishes an affirmative defense' violates the *Ex Post Facto* Clause," and quoted *Beazell* for its point that "any statute . . . which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*." 520 U.S. at 948 [quoting *Youngblood*, 497 U.S. at 49, and *Beazell*, 269 U.S. at 169-70]. Especially given the purpose of those citations in *Hughes Aircraft*, *see infra* p. 6, these are far more inclusive formulations of an *ex post facto* law than the "rigid," Br. Opp. at 6, and "technical," *People v. Frazer*, 21 Cal.4th at 763 n.24, theory of the State and the California Supreme Court.

The State tries to minimize the conflicts among jurisdictions, *see* Petn. at 8-10, by asserting that most of the *ex post facto* cases petitioner cited–in the statute of limitations area, and related areas such as pardon and immunity–were decided before *Youngblood*. Br. Opp. at 10-14. However, in *Youngblood* and after, this Court has held that "[t]he *Beazell* formulation is faithful to our best knowledge of the original understanding of the *Ex Post Facto* Clause." *Youngblood*, 497 U.S. at 43; *accord Lynce v. Mathis*, 519 U.S. 433, 440 (1997). Thus as the State acknowledges, Chief Justice Rehnquist's opinion in *Youngblood* reaffirmed *Beazell*. Br. Opp. at 6. The State therefore errs in claiming *Youngblood* so radically changed *ex post facto* analysis that no case before *Youngblood* is worthy of consideration. *See* Br. Opp. at 10-12.

Beazell described an *ex post facto* law as: "[A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission; or which deprives one charged with crime of any defense available according to law at the time when the act was committed." 269 U.S. at 169. (*Youngblood* had a similar formulation. 497 U.S. at 52.) A complete defense of limitations, pardon, immunity, etc. is a "defense available according to law" just like a defense such as entrapment, insanity, mistake of law (*Ostrosky v. State*, 704 P.2d 786, 791-92 (Alas. Ct. App. 1985)), or prison escape by necessity (*People v. Lovercamp*, 43 Cal.App.3d 823, 118 Cal.Rptr. 110 (1974)).

This Court has agreed, post-*Youngblood*. In *Hughes Aircraft Corp. v. Schumer*, 520 U.S. 939 [cited in Br. Opp. at 5], Justice Thomas's opinion for the Court relied on both *Youngblood* and *Beazell*, including the "any defense available according to law" passage from *Beazell* quoted above, in applying the presumption against civil statutory retroactivity to a defense that the allegedly withheld information was in possession of the Government. 520 U.S. at 848. The presumption against civil statutory retroactivity is utilized similarly to the *ex post facto* prohibition. *See Landgraf v. USI Film Products*, 511 U.S. at 266-67 & n. 20.

In *Hughes Aircraft*, the issue of who had the information was not within the State's rigid, technical theory of "definition of the [tort]"(*see* 31 U.S.C. § 3729). Like the limitations defense here, the

ostensibly abrogated defense in *Hughes Aircraft* was jurisdictional, affecting only the issue of standing to sue. Yet this Court cited *Youngblood* and *Beazell*, including *Beazell*'s "any defense available according to law" passage, to reject Schumer's claims.

The limitations defense here is no less a "defense available according to law," than the defense of Government possession of information was a "defense available according to law" in *Hughes Aircraft*. Perhaps neither fits exactly into the State's rigid, technical paradigm. But that paradigm is not and should not be the law.

The State's rigid, technical theory of an *ex post facto* law is also contrary to this Court's formulation in *Miller v. Florida*, 482 U.S. 423 (1987). There, Justice O'Connor's opinion for the Court stated that a retroactive amendment is not an *ex post facto* law if it "does not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." 482 U.S. at 432-33. California Penal Code § 803(g) clearly "changes the ultimate facts necessary to establish guilt" by eliminating a requirement for a guilty verdict, proof of compliance with the statute of limitations. As discussed *infra*, p. 6, it also increases the punishment for the charged crime, even under the State's narrow view.

The State also errs in claiming no post-*Youngblood* cases have found a federal *ex post facto* violation for retroactive abolition of a complete defense of statute of limitations, pardon, immunity, or the like. Br. Opp. at 12, 14.

First, the State misstates the holding of *Ex Parte Scales*, 853 S.W.2d 586 (Tex. Ct. Crim. App. 1993) [cited in Petn. at 10]. *Scales*, relying on *Youngblood*, found the abolition of the "carving doctrine" to be a judicial equivalent of an *ex post facto* law, using *ex post facto* standards, even though the Texas "carving doctrine" didn't fit within the technical "definition of the crime" paradigm the State uses here. *Scales*, 853 S.W.2d at 587-88. The State thus errs in claiming *Scales* found no *ex post facto* violation. Br. Opp. at 14.[1]

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[1] The State also misconstrues another case to which petitioner referred. Contrary to the State's claim, Br. Opp. at 14, *Dugger v. Williams*, 593 So.2d 180 (Fla. 1991) (per curiam) [cited in Petn. at 10] dealt with the federal as well as the

(continued...)

Second, other post-*Youngblood* opinions have also held that retroactive abolition of a complete defense violates the *Ex Post Facto* Clause, though their defenses were jurisdictional and thus not within the State's rigid, technical "definition of the crime" theory.

In *Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941, 947-48 (9th Cir. 1998), Judge Reed's opinion for the Court–relying on *Collins v. Youngblood*–held that the amendment which purported to create jurisdiction in the Tribal Court (and which sought to override *Duro v. Reina*, 495 U.S. 676 (1990)) would be *ex post facto* if applied retroactively. *Means* so held for three reasons: (1) Tribal Court jurisdiction would increase Means' exposure to punishment beyond that existing at the time of the charged offense; (2) retroactive application of the amendment would punish something which was not a crime at the time of the alleged offense, since "what constitutes 'a crime' is essentially what the sovereign defines as 'a crime,' [and] if the sovereign has no power over an individual then it essentially lacks the ability to define any of the individual's conduct as a crime"; and (3) retroactive application would deprive Means of a "defense available at the time of the alleged crime" (citing *Youngblood*, 497 U.S. at 52), namely, lack of jurisdiction.

Each of these three reasons in *Means* also applies to petitioner here: (1) Petitioner's exposure to punishment was increased beyond that existing at the time of the charged offense, for the reasons stated *infra*, p. 6 [discussing *Lynce v. Mathis* and similar cases]. (2) The sovereign (California) had no power of prosecution over petitioner beginning in 1990, and thus lacked the ability to define any of his conduct as a crime. (3) A fully ripe statute of limitations defense was a complete defense at the time of petitioner's alleged crime (1984). In fact, just as the issue in *Means* was a jurisdictional defense, the issue here–a California criminal statute of limitations–is also jurisdictional. *See Cowan v. Superior Court*, 14 Cal.4th 367, 374, 58 Cal.Rptr.2d 458, 926 P.2d 438 (1997).

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[1](...continued)
state Constitution, as it relied on another case which expressly referred to the federal *Ex Post Facto* Clause and opinions of this Court construing it. *Id.* at 181 [citing *Waldrup v. Dugger*, 562 So.2d 687, 691-92 (Fla. 1990)].

Similarly in *Helton v. Fauver*, 930 F.2d 1040, 1045 (3d Cir. 1991), the Third Circuit held that retroactive application of a statute permitting jurisdiction in Superior Court rather than juvenile court met the *Beazell/Youngblood ex post facto* standard, as it increased the punishment to which Helton was potentially subjected, and it also deprived Helton of a complete defense that the Superior Court lacked jurisdiction. (The dissent agreed with the majority on this point. *Helton*, 930 F.2d at 1049 (Hutchinson, J., dissenting).)

The Fourth Circuit reached a similar conclusion in *United States v. Juvenile Male*, 819 F.2d 468 (4th Cir. 1987). While *Juvenile Male* relied on *Beazell*, it preceded *Youngblood*. However, Judge Boochever's opinion in *United States v. Baker*, 10 F.3d 1374, 1394-95 (9th Cir. 1993), *cert. denied*, 513 U.S. 934 (1994), citing *Youngblood* and *Beazell*, reached the same conclusion based on the Fourth Circuit's analysis in *Juvenile Male*.

As the State points out, other courts have construed *Youngblood* differently, and have concluded that *Youngblood* abrogated *Beazell*'s inclusion of "any defense available according to law" in the *ex post facto* prohibition. Br. Opp. at 12-14; *accord* Petn. at 9. That is all the more reason why certiorari is warranted.

In any event, this case is well within the State's "rigid," "technical" paradigm, as shown by Justice Stevens' opinion for this Court in *Lynce v. Mathis*, 519 U.S. 433 (1997). California Penal Code section 803(g) does "increase[] the penalty by which a crime is punishable," *Lynce*, 519 U.S. at 443 [quoting *Morales*, 514 U.S. at 506 n.3]: It raises that penalty from zero, to 3-8 years. *See* Petn. at 24; Cal. Pen. Code § 288. It thus creates a "sufficient risk of increasing the measure of punishment attached to the covered crimes," *Morales*, 514 U.S. at 509; if petitioner were convicted (the only relevant scenario), the risk would be 100%. Just as cancellation of gain time in *Lynce* made prisoners ineligible for early release when they were previously eligible, so too even more here, cancellation of a statute of limitations made persons ineligible for immunity from punishment when they were previously immune. *See* Petn. at 24. Such a retroactive law, increasing potential punishment, is *ex post facto*. *Lindsey v. Washington*, 301 U.S. 397, 401-02 (1937); *Miller v. Florida*, 482 U.S. at 432-33; *see Morales*, 514 U.S. at 506 n.3.

Lynce postdated *Youngblood*, and is wholly consistent with it. Thus again, *Youngblood* cannot mean what the State, or the cases on which it relies, would have it mean.[2]

Youngblood makes clear that a mere change in "procedure by which a criminal case is adjudicated"–a change solely affecting method of adjudication, *see, e.g.*, Black's Law Dictionary 1203-04 (6th ed. 1991)–is usually not *ex post facto*. *Youngblood*, 497 U.S. at 45. But an expired statute of limitations (or immunity, pardon, etc.) is a full defense; and in California and other jurisdictions, the State must prove compliance with the statute for a conviction. *See ante*, p. 5. That is far from a mere procedure (method) of adjudication, especially in a state such as California, which considers a criminal limitations period substantive rather than procedural. *E.g.*, *Cowan v. Superior Court*, 14 Cal.4th at 371-72; *see Frazer*, 21 Cal.4th at 783 (Brown, J., dissenting). Indeed, a judgment can be based solely on a statute of limitations, and such a judgment is as binding as one based on failure of proof of an element. *United States v. Oregon Lumber Co.*, 260 U.S. 290, 300-01 (1922). By contrast, no judgment can be based solely on a mode of procedure.

In addition, the State's technical theory assumes a statute of limitations is not an element of a crime. *See, e.g.*, Br. Opp. at 5, 10, 12-14 & n.5; *People v. Frazer*, 21 Cal.4th at 757, 760, 764. But in some states, it is. *See, e.g.*, 11 Del. Code § 232; *Jacox v. State*, 154 Neb. 416, 419, 48 N.W.2d 390 (1951); 18 Pa. Cons. Stat. § 103(4); *see also* Mod. Pen. Code § 1.12(d). Similarly, many states consider other matters outside the State's "definition of crime" theory to be elements of crimes. *See, e.g.*, *State v. Losolla*, 84 N.M. 151, 152, 500 P.2d 436 (1972) [jurisdiction]; *Ross v. State*, 411 So.2d 247, 249 (Fla. 1982) [same]; *State v. Wagner*, 596 N.W.2d 83, 85 (Iowa 1999) [territorial jurisdiction]; *see also* Mod. Pen. Code § 1.13. The State's theory would be hopelessly muddled in these states.

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[2] Beyond that, it does not seem logical to postulate that changes in discretionary gain-time awards are within *ex post facto* analysis, *see Lynce v. Mathis*, 519 U.S. at 448-49, as are some parole eligibility modifications, *see id.* at 445, but abolition of a nondiscretionary, complete right to an acquittal is not.

Other jurisdictions might not necessarily use the formal term "element" (often, perhaps, because they never thought about it), but still require proof of jurisdictional and similar matters beyond a reasonable doubt as if they were elements. *See, e.g., State v. McLaughlin*, 80 N.Y.2d 466, 472 & n.*, 606 N.E.2d 1357, 591 N.Y.S.2d 966 (1992); *State v. Wardenburg*, 261 Iowa 1395, 158 N.W.2d 147, 151 (1968). It is unclear how the State's technical paradigm would apply in these jurisdictions, and why (if it all) it would be different from jurisdictions which use an "elements" label. However, if the State tried to defend its position in such a jurisdiction based on the label "element" (perhaps the only principled position the State could take), that effort would fail because "it is the effect, not the form, of [a] law that determines whether it is *ex post facto*." *Weaver v. Graham*, 450 U.S. 24, 31 & n.15 (1981).

Finally, the State has not disputed petitioner's showing that the *Ex Post Facto* Clause, the closely related Bill of Attainder Clause, and the closely related presumption against statutory retroactivity, are construed in this Court's opinions based on function or effect rather than rigid, technical forms. Petn. at 19-20. The State also has not tried to defend the California Supreme Court's truncation of the purposes of the *Ex Post Facto* Clause; which further shows the State's legal theory is not and should not be the law, since the State's theory cannot survive consideration of the purpose which the California Supreme Court omitted. *See* Petn. at 20-22. In addition, the State has not addressed petitioner's discussion of the major changes or uncertainties which would result in Fifth Amendment law, if an expired limitations period didn't provide certain immunity from prosecution. Petn. at 11. And the State doesn't contest the point that for purposes here, a complete limitations defense is akin to defenses such as pardon or immunity. Petn. at 10 & n.3, 21.

II. Due Process Clause

A. Fundamental Fairness

The State claims there is nothing fundamentally unfair about a government promising a conditional immunity from prosecution (here, the promise that all prosecutions shall be brought within 6 years after the alleged offense), then reneging on the promise years–or decades–after the condition was perfected and the

immunity became unconditional. Three of the seven Justices of the California Supreme Court thought otherwise, concluding that a government reneging on such a (fully ripe) promise not to prosecute was a violation of the California Constitution because it was so fundamentally unfair. *People v. Frazer*, 21 Cal.4th at 780 (Kennard, J., dissenting); *id.* at 782-84 (Brown, J., dissenting).

The United States Constitution, no less than the California Constitution as construed by the three dissenting Justices, prohibits as fundamentally unfair such a governmental breach of promise to an individual, materially affecting the individual's liberty or property. Petitioner already adverted to this in Petn. at 30. *See also, e.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135-39 (1810).

In addition, this Court has so held for breaches of promises by prosecuting authorities which materially disadvantage the recipient of the promise with respect to criminal prosecution. For example, when a government implicitly promises a suspect it won't use silence against him by giving *Miranda* warnings, it is fundamentally unfair and a denial of Due Process for the government to breach that promise, and the post-*Miranda* silence is inadmissible for all purposes. *Doyle v. Ohio*, 426 U.S. 284, 290-95 (1976); *Wainwright v. Greenfield*, 474 U.S. 284, 290-95 (1986). Similarly, if a government promises a person immunity for any statements, it is fundamentally unfair and a denial of Due Process for the State to breach that promise, and the statements cannot be used in a later prosecution. *Raley v. Ohio*, 360 U.S. 423, 437-40 (1959).

Such cases further show that when government makes a (material) promise which becomes unconditional and affects a liberty or property interest, it may not later renege. So too here.

The State appears to claim, twice, that the California Supreme Court's holding is justified because California Penal Code § 803(g) involves charged victims of sex offenses. Br. Opp. at 23, 24. There is no support for a theory that the Due Process Clause bars retroactive revocation of immunity for some prosecutions, but permits it for others. What provision of the Constitution would enable one to determine which prosecutions permit retroactive revocation, and which not? *Cf. Morales*, 514 U.S. at 510 n.7.

The Due Process Clause is intended to serve the purpose of "[insuring] the fair and orderly administration of the laws." *International Shoe Co. v. State of Washington*, 326 U.S. 310, 319 (1945); *see also, e.g., Loper v. Beto*, 405 U.S. 473, 494 (1972) (Burger, C.J., dissenting) [referring to the "very notion[] of ... orderliness embodied in the Due Process Clause"]. The State seeks, and the California Supreme Court held, the opposite. *See supra*, p. 1.

Petitioner doubts the Framers of our Constitution had such a disorderly view of the role of government. To the contrary: "Stability in Government, is essential to national character, and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society." James Madison, The Federalist No. 37.

B. Substantive Statutes Of Limitation

The State offers virtually nothing in response to the argument in Part II(B) of the petition. However, the State doesn't dispute the existence of the "substantive right" line of cases, which rely on federal and state Due Process guarantees to hold that substantive statutes of limitation cannot be retroactively abolished once they have expired. *See* Petn. at 16. As petitioner has shown, Petr. at 16-17, there is a split of authority on this subject. The State offers only a sentence of *ipse dixit* to the contrary. Br. Opp. at 27.

The distinction between procedural and substantive statutes of limitation clearly is significant. The petition set forth a logical and supported analysis of how that significance relates to the Due Process Clause and the issue here, firmly rooted in traditional state and federal jurisprudence. The State has made no effort to respond.

Dated this 10th day of April, 2000.

Respectfully submitted,

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